BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In The Matter of | ) | |
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| Implementation of Sections of | ) | |
| the Cable Television Consumer | ) | MM Docket 92-266 |
| Protection and Competition Act | ) | |
| of 1992 | ) | |
| | ) | |
| Rate Regulation | ) | |

# REPLY COMMENTS OF THE COALITION OF MUNICIPAL AND OTHER LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES

THE COALITION OF MUNICIPAL AND
OTHER LOCAL GOVERNMENTAL
FRANCHISING AUTHORITIES

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February 11, 1993

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## SUMMARY OF REPLY COMMENTS OF THE COALITION OF MUNICIPAL AND OTHER LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES

Pursuant to Rule 1.49(c) of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure1/, the Coalition of Municipal and Other Local Governmental Franchising Authorities ("Coalition") submits this summary of its reply comments.

### A. SCOPE OF THE FCC'S JURISDICTION OVER BASIC SERVICE TIER RATES

The FCC is obligated, in the absence of effective competition, to regulate basic service tier rates where a local franchising authority declines to regulate, as well as where a franchising authority's certification is disapproved or revoked.

### B. DETERMINATION REGARDING EXISTENCE OF EFFECTIVE COMPETITION

The FCC should allow a franchising authority to regulate once the authority has made an initial determination that the cable system is not subject to effective competition. A cable system should be allowed to challenge the franchising authority's determination, but consumers should have the benefit of franchising authority regulation while the challenge is pending. The FCC should reject the argument that a franchising authority should not be authorized to regulate until after a cable system has had

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1/ 47 C.F.R. § 1.49(c).

an opportunity to challenge the franchising authority's effective competition determination, and until the Commission has reached its own independent determination on the issue of effective competition.

**C. CERTIFICATION PROCESS**

Congress intended the certification process to be simple and straightforward, with certification to be effective thirty days after the franchising authority files its certification. The FCC should reject the suggestion that franchising authorities should be required to give notice to cable operators before filing a request for certification with the FCC. The FCC also should reject the suggestion that proceedings challenging a certification request should be conducted de novo. The FCC should require that the party challenging a certification bear the burden of proving that the certification should not be issued.

**D. COMPOSITION OF THE BASIC SERVICE TIER**

The Cable Act establishes only the minimum requirements for the basic tier. The FCC should therefore find that as long as all services in the basic tier are regulated by the local franchising authority in conformance with the basic tier regulations to be promulgated by the FCC, the Cable Act should not be interpreted to prohibit franchising authorities from negotiating with cable operators for the addition of signals and services to the basic tier. Nor should the Cable Act be deemed to preempt existing franchise

agreements which mandate a basic tier broader than the minimum prescribed by the Act. The FCC should thus reject the argument that the Cable Act preempts any local franchise agreements which specify the content or number of channels for the basic tier.

**E. EFFECTIVE DATE OF REGULATIONS**

The suggestion that the effective date of FCC regulations be delayed beyond the statutorily mandated date should be rejected. If the FCC does delay the effectiveness of its regulations, it should require that: (1) all current cable rates should be rolled back at least as far as the levels existing as of October 4, 1992 (the date of passage of the Cable Act), and (2) the rolled back rates should be made subject to refund.

**F. REGULATION OF EXISTING AND FUTURE BASIC SERVICE TIER RATES**

The FCC's regulations regarding basic service tier rates must ensure meaningful regulation. To that end, if the FCC allows cable operators to justify basic service tier rates above an established benchmark, franchising authorities must be given the reciprocal authority to lower such basic service rates below the benchmark where the facts justify that result.

The FCC must also require the collection of uniform data, including specific cost data, from the cable industry, for use by the FCC is establishing appropriate benchmarks

and by franchising authorities in evaluating the reasonableness of rates.

Government related expenses such as franchising fees, taxes, etc., should be removed from the benchmarking approach and given separate treatment.

**G. REGULATION OF RATES FOR BASIC EQUIPMENT**

The Cable Act provides for cost based regulation of all equipment used by subscribers to receive the basic service tier, regardless of whether the same equipment is also used to receive other cable programming services. The FCC should reject the argument that cost based regulation of equipment used by subscribers to receive the basic tier of services should be limited to that equipment used solely for the purpose of receiving the basic tier, and which is not used to receive any other cable services.

Cable operators should be allowed to charge a rate that is less than cost for equipment, provided that the same rate is charged to all subscribers using the equipment for any purpose and that such below-cost equipment rate is not used to seek to justify any above-cost non-equipment rates.

**H. COMPLAINT PROCEDURES FOR CABLE PROGRAMMING SERVICES**

The FCC should adopt flexible threshold standards for determining the sufficiency of a complaint alleging that a cable operator's non-basic tier programming rates are "unreasonable." For example, a complaint should be deemed sufficient (1) if it sets forth the rates currently charged

by the complainant's cable system, the amount such rates have increased for a given period, and the rates charged by other cable operators in areas near complainant's residence, or (2) if it alleges that rates exceed any relevant established benchmark rate.

If a benchmark approach to rate regulation is adopted, cable operators should be required to respond to complaints even if their rates are within the established benchmark. Consumers and franchising authorities must be allowed to challenge by complaint to the FCC the reasonableness of cable programming rates that are within an established benchmark yet are nonetheless unreasonable given the specific facts of the system involved.

The suggestion that consumers be required to file complaints with their local franchising authority, rather than directly with the FCC, should be rejected. The Cable Act grants consumers the right of direct access to the FCC via the filing of a complaint.

The suggestion that complaints must be filed within thirty days of notice of a change in non-basic service tier rates also should be rejected. The FCC should adopt a limitation period of 120 days from notice of a proposed change in non-basic service tier rates.

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# REPLY COMMENTS OF THE COALITION OF MUNICIPAL AND OTHER LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES

Pursuant to the Notice of Proposed Rulemaking issued December 24, 1992,1/ the Coalition of Municipal and other Local Governmental Franchising Authorities ("Coalition") submits these reply comments.2/

## INTRODUCTION

Much of the cable industry's comments in this docket fall into two general categories: (1) arguments which attempt to limit or to curtail to the maximum extent

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1/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992--Rate Regulation, MM Docket No. 92-266, Notice of Proposed Rulemaking, slip issued December 24, 1992 ("NPRM").

2/ The Coalition is an unaffiliated group of 28 local and municipal governments and municipal membership organizations comprising 102 local and municipal governments in 15 states, which are, or may be interested in, establishing themselves or their members as franchising authorities, or in establishing municipally-owned and operated cable television systems. The Coalition comprises the municipalities identified in Appendix A.

effective regulation, and (2) arguments which have as their ultimate goal the delay of effective regulation. The industry would have the Commission disavow its jurisdiction over entire areas of service and delay its regulation in many other areas. The industry in many instances urges the Commission to take its time in implementing the regulatory scheme mandated by Congress. While such arguments are often accompanied by an expressed desire to see the Commission implement a well-considered regulatory program, the simple reality is that the longer regulation is delayed, the longer the monopoly abuses which Congress sought to eradicate will continue. The expedited timetable for implementation mandated by Congress was a conscious decision to stop the monopoly abuses now, not to allow monopoly profits to continue to be enjoyed for years into the future.

Lost in the NPRM and in the cable television industry comments is the basic reason that Congress chose to regulate the industry: unregulated cable operators in monopoly circumstances exhibited an utter disregard for the needs of the public in their search for monopoly profits. The cable television industry comments, in the main, proceed from the apparent premise that the deregulated cable television industry was a healthy, competitive segment of the American economy which served well the needs of the public in an area of great national importance, and that what is needed now

more than anything is to keep regulation off the backs of the cable operators.

In point of fact, the opposite is true. The record before Congress contains numerous examples of monopoly abuse of consumers by cable operators. Congress found that, for an industry which has grown from one of basic entertainment to one of considerable national importance, the disciplines of the marketplace were not adequate to protect consumers because of the absence of real competition in much of the marketplace.

Basic cable service, particularly what has been defined as the basic service tier, is affected with the public interest. Congress found that the conduct of an unregulated cable industry in this area was and is unacceptable. It is for this reason that Congress chose what, in this era of governmental and fiscal restraint, is the extraordinary step of enacting a comprehensive regulatory scheme. Congress sought to ensure that the regulation was not stifling or heavyhanded by mandating that the regulation be no more than was adequate to ensure the reasonable conduct of cable operators. But Congress mandated regulation -- effective regulation -- that is adequate to protect the needs of the public. Effective regulation imposes necessary burdens on the industry regulated and the regulators, but Congress found that the greater public good lay in imposing such necessary burdens on the cable industry. Unnecessary

burdens are to be avoided, but, contrary to the apparent views of the cable industry, and to a certain extent this Commission, certain reasonable burdens will have to be imposed on the industry in order for effective regulation to be implemented.

## I. THE COMMISSION'S AUTHORITY TO REGULATE BASIC CABLE SERVICES IS NOT DEPENDENT UPON THE REJECTION OR REVOCATION OF A FRANCHISING AUTHORITY'S CERTIFICATION.

The cable industry, not surprisingly, has seized upon the Commission's circumscribed interpretation of its authority (and statutory obligations) under Section 623(a)(6) to argue, in effect, for the continued deregulation of the basic tier services in large areas of the country. The industry's interpretation is contrary to the plain language of the statute and the intent of Congress.3/

The National Cable Television Association, Inc. ("NCTA") adopts the Commission's tentative construction of the Cable Act4/ to argue that "if a franchising authority . . . elects not to apply for certification from the Commission to regulate basic tier rates, then the Commission

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3/ See "Initial Comments of the Coalition of Municipal and Other Local Governmental Franchising Authorities in Response to Notice of Proposed Rulemaking," dated January 27, 1993 ("Initial Comments"), pp. 4-12.

4/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act").

has no independent authority to step in and to regulate rates." 5/ As demonstrated by the Coalition in its Initial Comments,6/ this interpretation is contrary to the basic purpose and structure of the Cable Act. The sole legislative history upon which NCTA relies to support its interpretation is the same isolated passage from the House Report which accompanied H.R. 4850 which was cited in the NPRM.7/ In so doing, NCTA ignores other portions of the House Report,8/ the Senate Report which accompanied S. 12,9/ and the Conference Report10/ which demonstrate Congress' clear intent to ensure that the rates for the

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5/ Comments of The National Cable Television Association, Inc., dated January 27, 1993, p. 64 ("NCTA Comments"). NCTA's argument is echoed by many industry commenters. See, e.g., Comments of Continental Cablevision, Inc., dated January 27, 1993, pp 13-14 ("Continental Comments"); Comments of Tele-Communications, Inc., dated January 27, 1993, pp. 42-43; and Comments of the Cablevision Industries Corporation, dated January 27, 1993, pp. 57-58 ("CIC Comments").

6/ Initial Comments, pp. 4-12.

7/ NCTA Comments, p. 64 n. 64.

8/ House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. ("House Report").

9/ Senate Committee on Commerce, Science and Transportation, Senate Report No. 102-92, 102nd Cong., 2d Sess. ("Senate Report").

10/ Conference Report to Accompany S.12, "Cable Television Consumer Protection and Competition Act of 1992," 102nd Cong., 2d Sess, Report 102-862 ("Conference Report").

basic service tier of every cable system are reasonable.11/

The House Report upon which NCTA relies contains a letter from the Congressional Budget Office which provided the House with an estimate of the cost of implementing the regulatory scheme which the House was proposing. The budget estimate which the House accepted and included in its report accompanying H.R. 4850 to conference expressly assumed that:

> [w]here franchising authorities decline to do so or fail to meet the specified standards, the bill would require the FCC to regulate rates. [12/]

The House Report expressly contemplates that the Commission would be required to regulate in circumstances in which a franchising authority declined to regulate, as well as in those circumstances in which a franchising authority's certification was disapproved or revoked. The House Report makes it clear that the House did not understand that it was creating the regulatory gap which NCTA (and the NPRM) postulate.

The Senate clearly did not intend to create a regulatory gap. The Senate Report expressly provides that, as embodied in S. 12, the Senate intended the kind of comprehensive regulation identified by the Coalition in its Initial Comments:

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11/ Cable Act, Section 623(b)(1).

12/ House Report, p. 75.

> A franchising authority (city, county or State) can obtain jurisdiction over basic rate regulation by certifying to the FCC that it will follow the FCC's procedures and standards. Otherwise, rate regulation authority remains with the FCC. [13/]

The Senate bill proposed the regulatory standard for basic service tier rates which was adopted by Congress - i.e., that the Commission, by regulation, shall ensure that the rates for the basic service tier are reasonable.14/ In conference, the intent to ensure the reasonableness of the basic service tier rates of any cable system was confirmed by the addition of Section 623(b)(1), which establishes as the Commission's basic goal the promulgation of regulations which protect:

> subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition. [15/]

The Conference Report manifests the clear Congressional intent to provide comprehensive and effective regulation of the rates for the basic service tier for any cable system that is not subject to effective competition. Congress did not conclude that cable systems in areas where there is not effective competition and where there is no franchising

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13/ Senate Report, p. 63.

14/ Senate Report, pp. 74-75.

15/ Conference Report, p. 62.

authority able or willing to regulate were to remain unregulated as to their basic service tier rates.

In order to adopt the NCTA interpretation, the Commission must answer the question: why would Congress, in its efforts to protect consumers from excessive rates, particularly with respect to the basic service tier, intentionally create a gap in which neither the Commission nor the local franchising authority would be able to regulate? The answer is that Congress created no such gap. None of the commenters cites any further legal authority for the conclusion that Congress intended to create a regulatory gap.

The paramount purpose of the Cable Act -- and a purpose which must be effectuated by the Commission regulations to be promulgated here -- is to ensure that rates for basic cable service are reasonable.16/ The Commission regulations promulgated to achieve this basic goal must be designed to protect subscribers of any cable system that is not subject to effective competition.17/

The jurisdictional gap postulated by the Commission and a number of parties is not consistent with the Cable Act's directive and therefore is not permissible; the Congressional mandate that basic service rates be reasonable cannot be carried out if, in the absence of effective

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16/ Cable Act, Section 623(b)(1).

17/ Id.

competition, no one regulates those rates. The Cable Act appropriately expresses a preference for local rather than federal regulation of basic service tier rates; the Cable Act does not, however, express a preference for no regulation of the basic service tier in the event that a franchising authority does not seek certification. Rather, both the Cable Act (as discussed above) and the legislative history contemplate that the FCC would regulate the rates for the basic service tier in those instances where the franchising authority either declines to regulate or where the franchising authority's certification is disapproved or revoked.18/

Finally, the position that the Commission cannot regulate unless the franchising authority has sought to assert regulatory jurisdiction over basic cable service is illogical and would lead to the exultation of form over substance. If this position were correct, franchising authorities without the wherewithal immediately to assert jurisdiction may nevertheless be forced into filing for certification in order to ensure that the Commission will review basic service tier rates to confirm that those rates are reasonable to consumers within their jurisdictions. It makes little sense to require franchising authorities which may currently be unable to meet certification requirements to expend their time and resources to file requests for

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18/ House Report, p. 75.

certification simply to assure that consumers within their jurisdiction will be protected. Likewise, it makes little sense to require the Commission to expend its time and resources to reject such applications.

The far more reasonable approach is for the Commission to recognize -- as it must under the Cable Act -- that it has a duty to ensure that the rates for the basic service tier are reasonable and that it will regulate those rates in any instance where a local franchising authority does not assert jurisdiction.

## II. THE COMMISSION SHOULD REJECT ARGUMENTS WHICH WOULD HAVE THE EFFECT OF DELAYING IMPLEMENTATION OF EFFECTIVE REGULATION.

The cable industry has raised numerous arguments as to why the Commission should go slowly in implementing its regulations. At no point does the industry acknowledge the obvious: the longer it takes for effective regulation to begin, the longer the industry remains free to charge consumers ever more excessive rates, particularly in the hope that the Commission will endorse the idea that "current rates" should be assumed to be reasonable. Consumers have already seen numerous rates increase since October 4, 1992, the date of passage of the Cable Act. Further delay in implementation of the Cable Act's regulatory scheme will do nothing more than to encourage more efforts by the industry to raise further already excessive rates.

**A. The Effective Date of the Regulations Should Not Be Delayed Unless Coupled With a Rollback of Existing Rates to at Least October 4, 1992 Levels and Those Rates Are Made Subject to Refund.**

NCTA and other industry commenters19/ endorse the Commission's suggestion that the effective date of its regulations may be delayed beyond the statutorily-mandated date for establishment of regulations (i.e., 180 days from enactment). Although the need for a well-reasoned regulatory scheme is obvious, the need for immediate protection from excessive rates is paramount. Delay in the effectiveness of the Commission's regulations for the six months or more that several commenters advocate would, without some interim protection, continue the deregulated practices of the cable industry for more than a year after Congress decided to regulate it. Congress' prescription that the Commission must promulgate effective regulations within 180 days of enactment20/ is clear evidence of Congress' intent to institute on an expedited basis regulatory protection against excessive rates.

The Commission should not delay the effectiveness of its regulations beyond April 3, 1993. If the Commission chooses to delay the effectiveness of its regulations, it should couple such delay with the following two steps: (1)

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19/ See, e.g., Comments of Continental Cablevision, Inc., pp. 74-75; and Comments of Tele-Communications, Inc., pp. 69-70.

20/ Section 623(b)(2).

all existing cable television rates should immediately be rolled back at least to October 4, 1992 levels, and (2) those rolled back rates immediately should be made subject to refund pending an initial review of the reasonableness of those rates. These two steps are necessary to ensure that consumers are not subject to rates even more excessive than the rates in effect at the time that Congress enacted legislation to protect consumers from those excessive rates.

The record before Congress contains ample evidence of the excessiveness of rates prior to October 4, 1992.21/ Since October 4, 1992, numerous cable systems have increased rates in an apparent attempt by some to have even higher rates "grandfathered" under the new regulatory scheme. Thus if the regulation effective date is to be delayed, then at a minimum, rates should be rolled back to October 4, 1992 levels in order to remove this bloat. Making such rates subject to refund (with interest) would provide some protection from already excessive rates. Section 623(h), which authorizes the Commission to take steps to prevent evasion of the Cable Act, provides the Commission with the authority to establish such interim measures to protect consumers.

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21/ See Senate Report, p. 75; House Report, p. 79; 86.

**B. Local Franchising Authority Regulation Should Not Be Delayed Pending the Outcome of Cable System Challenges to Determinations of the Absence of Effective Competition.**

The Commission proposed that the initial determination of whether effective competition exists should rest with the franchising authority.22/ NCTA argues that a franchising authority should not be authorized to regulate until after the cable system company has had an opportunity to obtain and to present what it believes to be relevant evidence on the question of effective competition, and until after the Commission reviews the evidence and reaches its own independent determination as to whether a given cable system is subject to effective competition. NCTA's argument in effect eviscerates the Commission's proposal that the determination be made by the franchising authority, threatens to embroil the Commission in a case-by-case evaluation of effective competition in each franchise area in the country and, more importantly, could delay the institution of effective regulation for many years.

While it is reasonable and consistent with the Cable Act to permit a cable operator or any interested party to challenge a finding that effective competition exists, under the explicit terms of the statute, that challenge must be completed within 30 days or the certification becomes effective unless and until the Commission finds that there

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22/ NPRM. p. 12.

is effective competition. NCTA ignores this explicit statutory language and asserts that certification should be delayed for at least 60 days after the initial filing. NCTA proposes that certification would not become effective until (1) cable operators had a "reasonable" opportunity (thirty days) to demonstrate that effective competition does exist plus (2) thirty days after the Commission determines that competition is indeed lacking (NCTA proposes no time limits on the Commission's determination).23/

NCTA's requests are at odds with the Cable Act's requirement that certification shall be effective 30 days after the date of filing and should be rejected. A franchising authority cannot be certificated if effective competition exists; hence, any finding concerning whether there is or there is not effective competition must also be made within the thirty day period specified in the Cable Act. Cable operators -- and not franchising authorities -- are more likely to be in possession of the information and data necessary to refute a finding that competition does not exist.24/ Hence in those few instances in which

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23/ NCTA Comments, p. 66-67.

24/ The Coalition finds NCTA's comments concerning the provision of information to be both contradictory and self-serving. NCTA argues that franchising authorities must "present evidence documenting their determination [so] that operators are provided an adequate opportunity to challenge that determination." Comments of NCTA, p. 66 ("NCTA Comments"). Yet NCTA argues against requiring cable operators to provide data to

(continued...)

franchising authorities incorrectly determine that effective competition does not exist, cable operators should readily be able to refute that conclusion with data which is in their possession.

NCTA's argument could effectively consign the determination of whether effective competition exists to years of litigation. For a cable system seeking to avoid regulation, the cost of protracted litigation could be viewed as a simple cost of doing business if the mere existence of the litigation itself would forestall effective regulation.

The Commission should require that the franchising authority make a threshold determination, based upon a minimum of objective and readily ascertainable factors, as to whether or not effective competition exists. Upon a determination that there is no effective competition, a certified franchising authority would be empowered to regulate. Cable systems would then be free to challenge the determination of no effective competition, but during the pendency of litigation, consumers would have the benefit of franchising authority regulation.

The establishment of the aforementioned approach would be a reasonable exercise by the Commission of its authority

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24/(...continued)
need routinely to obtain this information from all operators." Id. at p. 83.

to avoid evasion of the Cable Act.25/ The approach would impose the burden on the cable system, the entity in control of much of the essential data, to demonstrate the existence of competition. The Coalition's approach would also recognize a known fact -- that the overwhelming majority of cable systems in this country are not subject to effective competition.26/

## III. REGULATION OF BASIC SERVICE TIER RATES

In its Initial Comments on the subject of basic tier rates, the Coalition stressed, among other things, that:

- The paramount goal of Congress in passing the Cable Act was to ensure that cable rates, present and future, are reasonable;
- That given the nature of the cable industry, including the large number of cable companies and limited resources of most franchising authorities, a benchmarking approach is probably appropriate if the necessary safeguards are adopted;
- For benchmarking to be effective, the Commission must engage in an effective

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25/ Section 623(h).

26/ Senate Report, pp. 8-9.

data-gathering exercise so that the benchmark rates would have a cost basis;

- There must be meaningful classifications of cable operators so that the benchmarks have relevance to the affected companies;
- Cable operators must not be permitted automatically to raise their rates to the applicable benchmark; and
- Cable operators and franchising authorities must have the right to seek to show that the applicable benchmark is not appropriate for the affected operator.

After reviewing the initial comments of the other parties to this proceeding, the Coalition reaffirms its commitment to the above principles. It is crystal clear from reviewing the comments of the cable operators that their goal is to continue business as usual, albeit cloaked in regulatory buzz words in order to satisfy the Commission's own rather timid view of its responsibilities under the Cable Act.

One theme running throughout the comments of the cable companies is that since the cable industry has experienced a high rate of growth since deregulation, it follows that this